IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

MONDAY, THE 11TH JUNE 2007 / 21ST JYAISHTA 1929

WP(C).No. 13327 of 2007(J)

AGAINST THE ORDER DATED 02/04/2007 IN IA 2039/207 IN OS.195/2007 of II ADDL.SUB COURT,ERNAKULAM

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PETITIONER:

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1. VENUGOPALAN NAIR, CHITHIRAM HOUSE, VATTIYOORKAVU VILLAGE, TRIVANDRUM.

2. M/S.HOTEL VENUS INTERNATIONAL, REP. BY SALE PROPRIETOR, K.VENUGOPALAN NAIR, S/O.KRISHNA PILLAI, S.S.KOVIL ROAD, THAMPANOOR, TRIVANDRUM.

3. M/S.ANSU ENTERPRISES, REP. BY PARTNER VIJAYA VIKRAMAN NAIR, VINITHA BHAVAN, T.C.10/1250, MANNARAKONAM VATTIYOORKAVU VILLAGE, TRIVANDRUM. (PETITIONERS REP. BY POWER OF ATTORNEY HOLDER N.GOPALAKRISHNAN NAIR, HOUSE NO.14, SREE-NAGAR, MANAKADU VILLAGE, TRIVANDRUM).

BY ADV. SRI.G.S.REGHUNATH

RESPONDENTS:

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1. GOSREE DEVELOPMENT AUTHORITY, REP. BY ITS SECRETARY, PARK AVENUE, COCHIN.

2. THE SECRETARY, GOSREE DEVELOPMENT AUTHORITY, PARK AVENUE, COCHIN, (DISTRICT COLLECTOR, ERNAKULAM).

BY ADV. SRI.VARGHESE K.PAUL

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 11/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N. KRISHNAN, J.

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W.P.(C) No. 13327 OF 2007 J
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Dated this the 11th June, 2007

J U D G M E N T

This writ petition is preferred challenging Ext. P4 order passed by the learned Subordinate Judge, Ernakulam, in I.A. No. 2039/07 in O.S. No. 195/07. Brief facts necessary for the disposal of the writ petition are stated as follows: The present writ petitioners have filed a suit against the Gosree Development Authority and the State of Kerala with a prayer that they are entitled to a compensation of Rs.70 crores jointly and severally from the defendants. Along with the suit they moved an application for interim attachment and the order in it is the subject matter of this writ petition. A reference to the said attachment application which is marked as Ext. P2 would show that the main prayer is that "this Hon'ble court may be pleased to issue an order of attachment before judgment of the property in the above said village." In the prayer portion there is a prayer to direct the counter petitioners to furnish security to satisfy the

suit amount and in the meantime conditionally attach the property which is scheduled separately. Before dealing with other facts I may refer to Order XXXVIII Rule 5. Under Order XXXVIII Rule 5, where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the court may after giving show cause notice to him why he should not furnish security pass an order of attachment. Otherwise the object of Order XXXVIII Rule 5 is to give the plaintiff a feeling of security in the event of his ultimately winning the case. It is equally well settled principle of law that Order XXXVIII Rule 5 cannot be used superficially and the court must be satisfied that there are genuine valid grounds to order an attachment, for the reason that it affects the freedom of one person on his property. It is also a settled principle that the court is bound to look into

the prima facie case to satisfy that there is a possibility of the plaintiff in getting a decree. With these principles in mind let me analyse the whole case. The plaintiffs herein were one of the tenderers to purchase items of property that was transferred to Gosree by the Government for the purpose of constructing bridges across the backwaters. The plaintiffs submitted tenders and it reached a stage wherein it was accepted and as per the terms of the agreement they were bound to furnish a bank guarantee within a period of ten days. When it reached that stage there was dispute between the authority and the plaintiffs and the plaintiffs contended for the position that one has to get exemption from the Government under the provisions of the Kerala Land Reforms Act in order to hold more than 15 acres of property which one can hold under the Land Reforms Act. They canvass for the position that the agreement has to be read and understood that it is also a condition attached to the agreement and therefore in the absence of the authority getting permission from the Government regarding the exemption then there is a breach

committed by them. It is submitted that the bank authorities before granting a guarantee demanded the petitioners to produce the exemption certificate so as to enable them to furnish the security. But the authority took a different stand and as per the terms of clause 10 of the agreement the tender was cancelled. Then there was litigations and this Court in writ petitions held that it forms part of the agreement and ultimately the matter reached the Apex Court. The Apex Court on an elaborate consideration of the entire law on the subject as well as the terms of the agreement held that the contention that the authority has to get the consent or exemption from the Government regarding the holding of lands is not a condition attached to the tender conditions and therefore any breach committed by the tenderer of the terms of clause 10 will disentitle that person and that the authority will be at liberty to proceed and accept the next tender. Accordingly, the Apex Court as per Ext. P3 judgment ordered as follows:

> "The appellants (Puravankara Projects Ltd.) had stated their willingness to match the amount offered by Venus and also to pay interest in terms of the contract. It has

> been stated that the whole amount shall be paid and they shall not give any bank guarantee. Let the amounts offered by Venus be paid by the appellants within a period of one month from today with interest @ 12% p.a. from the date of allotment. The amount, if any deposited by Venus will be refunded with interest @ 9% from the date of deposit within a period of six seeks."

Or otherwise there was a mandate by the Apex Court to give the property to Puravankara Projects Ltd. if they comply with the terms embodied in the judgment. Subsequently, I.A. No. 4/2007 was filed on which the Apex Court has confirmed and reiterated what it has stated earlier. So the transfer of plots D3, D4 and D5 by the authority in favour of Puravankara Projects Ltd. is only in compliance of the directions of the Apex Court and not by violating or taking an independent decision of their own. The whole suit revolves round the question as to who committed the breach of agreement and whether the plaintiffs are entitled to damages as prayed for. Prima facie, it has to be held that the whole transactions done by the authority is only in compliance with the directions of the Apex Court and therefore one can hold that the plaintiffs have discharged the burden of a prima facie case in

their favour at least at this stage. Therefore doing anything at this stage will run contra to the directions given by the Apex Court and therefore it cannot be entertained. I may also like to point out that the plaintiffs have not come to the court with clean hands. They were totally aware of the proceedings before the Apex Court and the suit is filed after the Apex Court had given a direction to the authority regarding the transfer of lands. It is that property which is proposed to be transferred in favour of Puravankara Projects Limited that is sought to be attached by filing a suit of this nature. If this is attached really it will amount to the non-compliance of the directions of the Supreme Court and the authority will be in trouble. So a man who seeks equity from the courts is expected to come to the court with clean hands and I may say that all is not well with the pleadings in this case.

2. Now the learned counsel for the writ petitioner strongly contends that the authority, namely, the 1st defendant in the suit may be wound up at any stage and if it is so, then there will not be anybody to take up

the liabilities or responsibilities of the 1st respondent and therefore there must be an order for furnishing security. This writ petition is filed to invoke the supervisory jurisdiction of this Court under Article 227 of the Constitution of India and it is a continuation of the proceedings of the trial court. There is absolutely no averment in the petition regarding that aspect. It is also to be stated that though the plaintiffs have claimed damages against the Government as well in the suit when it comes to the stage of attachment they left the Government most probably knowing fully well that nobody will direct security to be furnished by the Government. The learned counsel for the authority would submit that this is only an after thought after the disposal of the interim attachment application and it shall not be taken as a ground for consideration in this case. There is considerable force in the said contention and I find that such an apprehension is not well founded. There are no materials that the Government is immediately going to wind up the Gosree project and it is also well known fact that when the Government forms

a project and decides to dissolve the project there will be terms and conditions regarding the rights and liabilities of the parties who are involved in the transaction. So the mere apprehension without any evidence on that regard also cannot be accepted for interfering with the order rendered by the trial court. The learned counsel for the writ petitioner then submits that at least there must be a direction to the authority to furnish security with respect to the earnest money. The question prima facie as per the agreement is there is a clause for forfeiture of the earnest money when the tender is cancelled. The question of unenrichment and whether there will be other sufficient reasons to hold that the authority is not empowered to forfeit the entire amount or all matters which require detailed consideration and scrutiny when the trial of the case starts. The mere apprehension that the authority will be penniless at that stage is not correct and therefore it may not be proper to order attachment at this stage. Therefore from these discussions I hold that I am not satisfied about a prima facie case and further I am not satisfied

that defendants 1 and 2 in the case with an intent to defeat or delay the execution of any decree that will be obtained by the plaintiffs is attempting to transfer any immovable property or take away the property for the said purpose. So the prima facie conditions under Order XXXVIII Rule 5 are not satisfied and when it is so a direction to be given to the defendants to furnish security may not be strictly in accordance with law and therefore it cannot be allowed. So, I find that the writ petition is devoid of merit and is liable to be dismissed and I do so. I make it clear that when the suit is being considered for trial the trial court is directed not to take into consideration any of the observations made by me in the judgment and untrammelled by the observations it must proceed independently in accordance with law and on the basis of the available materials and the question of law.

M.N. KRISHNAN
JUDGE

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